HOUSE BILL No. 1142

DIGEST OF INTRODUCED BILL

Citations Affected: IC 24-4.6-4.

Synopsis: Home loan protection act. Regulates certain consumer mortgages and prohibits certain lending practices.

Effective: July 1, 2002.

Crawford

January 9, 2002, read first time and referred to Committee on Financial Institutions.

Introduced

Second Regular Session 112th General Assembly (2002)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2001 General Assembly.

HOUSE BILL No. 1142

A BILL FOR AN ACT to amend the Indiana Code concerning consumer credit.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 24-4.6-4 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]:

Chapter 4. Home Loan Protection Act

Sec. 1. As used in this chapter, "benchmark rate" means the interest rate the borrower can reduce by paying bona fide discount points. This rate may not exceed the weekly average yield of United States Treasury securities having a maturity of five (5) years, on the fifteenth day of the month immediately before the month in which the loan is made, plus four (4) percentage points.

Sec. 2. As used in this chapter, "bona fide discount points" means loan discount points that are:

(1) knowingly paid by the borrower;

(2) paid for the express purpose of lowering the benchmark rate;

(3) in fact reducing the interest rate or time-price differential applicable to the loan from an interest rate that does not

exceed the benchmark rate; and
(4) recouped within the first four (4) years of the scheduled loan payments, if the reduction in the interest rate that is achieved by the payment of the loan discount points reduces the interest charged on the scheduled payments so that the borrower's dollar amount of savings in interest over the first four (4) years is equal to or greater than the dollar amount of loan discount points paid by the borrower.

Sec. 3. As used in this chapter, "borrower" means a person obligated to repay the loan, including a coborrower, cosigner, or guarantor.

Sec. 4. As used in this chapter, "creditor" means a person who extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four (4) installments, and to whom the obligation is payable at any time.

Sec. 5. As used in this chapter, "department" means the department of financial institutions.

Sec. 6. As used in this chapter, "flipping" refers to the making of a home loan to a borrower that refinances an existing home loan when the new loan does not have reasonable, tangible net benefit to the borrower considering all the circumstances, including the terms of both the new and refinanced loans, the cost of the new loan, and the borrower's circumstances.

Sec. 7. As used in this chapter, "high cost home loan" means a home loan in which the terms of the loan meet or exceed one (1) or more of the thresholds described in section 11 of this chapter.

Sec. 8. As used in this chapter, "home loan" means a loan, other than a reverse mortgage transaction, but including an open end credit plan, where the loan is secured by a:
(1) mortgage or deed of trust on real estate in Indiana upon which there is located or there is to be located a structure or structures designed primarily for occupancy of one (1) to four (4) families that is or will be occupied by a borrower as the borrower's principal dwelling; or
(2) security interest on a manufactured home that is or will be occupied by a borrower as the borrower's principal dwelling.

Sec. 9. As used in this chapter, "points and fees" means any of the following:
(1) An amount payable under a point, discount, or other system or additional charges.
(2) Service or carrying charge.
(3) Loan fee, finder's fee, or similar charge.

(4) Fee for an investigation report.

(5) Items exempted from computation of finance charge in extensions of credit secured by an interest in real property. However, the following items, when charged in connection with any extension of credit secured by an interest in real property, may not be included in the computation of the finance charge with respect to that transaction:

(A) Fees or premiums for title examination, title insurance, or similar purposes.

(B) Fees for preparation of loan related documents.

(C) Escrows for future payments of taxes and insurance.

(D) Fees for notarizing deeds and other documents.

(E) Appraisal fees, including fees related to any pest infestation or flood hazard inspections conducted before closing.

(F) Credit reports.

(6) All compensation paid directly or indirectly to a mortgage broker, including a broker that originates a loan in its own name in a table funded transaction.

(7) The cost of all premiums financed by the creditor, directly or indirectly, for:

(A) credit life;

(B) credit disability;

(C) credit unemployment;

(D) credit property insurance;

(E) other life or health insurance; or

(F) any payments financed by the creditor directly or indirectly for any debt cancellation or suspension agreement or contract. However, insurance premiums calculated and paid on a monthly basis are not considered financed by the creditor.

(8) The maximum prepayment fees and penalties that may be charged or collected under the terms of the loan documents.

(9) A prepayment fee or penalty that is charged the borrower if the loan refinances a previous loan made by the same creditor or an affiliate of the creditor.

(10) For an open end loan, the points and fees that result from adding the total fees charged at closing plus the maximum additional fees that can be charged under the loan documents during the term of the loan.

Sec. 10. As used in this chapter, "rate" means the interest rate charged on the home loan, based on an annual simple interest yield.

Sec. 11. As used in this chapter, "threshold" means any of the following:

(1) Rate threshold, which means:

(A) for a first lien mortgage loan, that the trigger rate equals or exceeds six (6) percentage points over the weekly average yield on five (5) year United States Treasury securities; and

(B) for a subordinate mortgage lien or a mortgage secured solely by a security interest in a manufactured home, that the trigger rate equals or exceeds eight (8) percentage points over the weekly average yield on five (5) year United States Treasury securities.

(2) Total points and fees threshold, which means the total points and fees on the loan, paid by the borrower at or before closing, that exceed:

(A) three percent (3%) of the total loan amount, excluding up to two (2) bona fide discount points, for a loan in which the total amount of the loan is at least thirty thousand dollars ($30,000); or

(B) the lesser of nine hundred dollars ($900) or six percent (6%), excluding up to two (2) bona fide discount points, for a loan in which the total amount of the loan is less than thirty thousand dollars ($30,000).

(3) Prepayment penalty threshold, which means the home loan agreement permits the lender to charge or collect payment penalties or penalties more than thirty (30) months after the loan closing or that exceed, in the aggregate, more than two percent (2%) of the amount prepaid.

Sec. 12. As used in this chapter, "total loan amount" means the:

(1) principal of the loan plus the points and fees that are included in the principal amount of the loan; or

(2) total line of credit allowed under the home loan for an open end loan.

Sec. 13. As used in this chapter, "trigger rate" means:

(1) the rate as of the date of closing, for fixed rate loans in which the interest rate will not vary during the term of the loan;

(2) the sum of the index rate as of the date of loan closing plus the maximum margin permitted at any time under the loan agreement, for loans in which the interest varies according to an index; or

(3) the maximum rate that may be charged during the term of

the loan, for all other loans in which the rate may vary at any time during the term of the loan.

Sec. 14. (a) A creditor making a home loan may not finance, directly or indirectly, any:

(1) credit life insurance;

(2) credit disability insurance;

(3) credit unemployment insurance;

(4) credit property insurance;

(5) other life or health insurance; or

(6) payments directly or indirectly for any cancellation suspension agreement or contract.

However, insurance premiums, debt cancellation fees, or suspension fees calculated and paid on a monthly basis may not be considered financed by the creditor.

(b) A creditor may not engage in flipping. Home loan refinancings are presumed to be flippings if the:

(1) primary tangible benefit to the borrower is an interest rate lower than the interest rate on debts satisfied or refinanced in connection with the home loan, and it will take more than four (4) years for the borrower to recoup the costs of the points and fees and other closing costs through savings resulting from the lower interest rate; or

(2) new loan refinances an existing home loan that is a special mortgage originated, subsidized, or guaranteed by or through a state or local government or nonprofit organization, that either bears a below market interest rate at the time the loan was originated or has nonstandard payment terms beneficial to the borrower, including payments that vary with income, are limited to a percentage of income, or where no payments are required under specified conditions, and where, as a result of the refinancing, the borrower will lose one (1) or more of the benefits of the special mortgage.

(c) A creditor shall not recommend or encourage default on an existing loan or other debt before and in connection with the closing or planned closing of a home loan that refinances all or any part of such existing loan or debt.

(d) A creditor may not charge a late payment fee except according to the following rules:

(1) The late payment fee may not be in excess of four percent (4%) of the amount of the payment past due.

(2) The late payment fee may be assessed only for a payment past due for fifteen (15) days or more.

(3) The late payment fee may not be charged more than one (1) time with respect to a single late payment. If a late payment charge is deducted from a payment made on the loan, and the deduction causes a subsequent default on a subsequent payment, no late payment charge may be imposed for the default. If a late payment charge has been imposed one (1) time with respect to a particular late payment, a late payment fee may not be imposed with respect to any future payment that would have been timely and sufficient, but for the previous default.

(4) A late payment fee may not be charged unless the creditor notifies the borrower within forty-five (45) days following the date the payment was due that a late payment charge has been imposed for a particular late payment. No late payment charge may be collected from any borrower if the borrower informs the creditor that nonpayment of an installment is in dispute and presents proof of payment within forty-five (45) days after receipt of the creditor's notice of the late charge.

(5) A creditor shall treat each payment as posted on the same date as it was received by the creditor, servicer, or creditor's agent, or at the address provided to the borrower by the creditor, servicer, or the creditor's agent for making payments.

(e) A home loan may not contain a provision that permits the creditor, in its sole discretion, to accelerate the indebtedness. This subsection does not prohibit acceleration of the loan in good faith due to the borrower's failure to abide by the material terms of the loan.

(f) A creditor may not charge a fee for informing or transmitting to a person the balance due to pay off a home loan or to provide a release upon prepayment. A creditor must provide payoff balance not later than seven (7) business days after the request is received by the creditor.

Sec. 15. (a) A high cost home loan has the following additional limitations and prohibited practices:

(1) A creditor making a high cost home loan may not directly or indirectly finance any points or fees.

(2) Prepayment fees or penalties must be included in the loan documents for a high cost home loan or charged the borrower if the fees or penalties exceed in the aggregate:

(A) in the first twelve (12) months after the loan closing, more than two percent (2%) of the loan amount prepaid;

or

(B) in the second twelve (12) months after the loan closing, more than one percent (1%) of the amount prepaid.

A prepayment penalty may not be contracted for after the second year following the loan closing.

(b) A high cost home loan may not contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments, unless the payment schedule is adjusted to the seasonal or irregular income of the borrower.

(c) A high cost home loan may not include payment terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due.

(d) A high cost home loan may not contain a provision that increases the interest rate after default. However, this subsection does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents, if the change in the interest rate is not triggered by the event of default or the acceleration of the indebtedness.

(e) A high cost home loan may not include terms under which more than two (2) periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower.

(f) A high cost home loan may not have a mandatory arbitration clause that limits the right of the borrower to seek relief through the judicial process for a claim or defense the borrower may have against the creditor, broker, or other party involved in the loan transaction.

(g) A creditor may not make a high cost home loan without first receiving certification from a counselor approved by the United States Department of Housing and Urban Development, a state housing financing agency, or the department, that the borrower has received counseling on the advisability of the loan transaction.

(h) A creditor may not make a high cost home loan without regard to repayment ability. If a creditor presents evidence that the creditor followed commercially reasonable practices in determining the debt-to-income ratio, there is a rebuttable presumption that the creditor made the loan with due regard to repayment ability.

(i) A creditor may not pay a contractor under a home improvement contract from the proceeds of a high cost home loan, unless:

(1) the creditor is presented with a signed and dated completion certificate showing that the home improvements have been completed; and

(2) the instrument is payable to the borrower, or jointly to the borrower and the contractor, or, at the election of the borrower, through a third party escrow agent under a written agreement signed by the borrower, the creditor, and the contractor before the disbursement.

(j) A creditor may not charge a borrower any fees or other charges to modify, renew, extend, or amend a high cost home loan or to defer any payment due under the terms of a high cost home loan.

(k) A creditor making a high cost home loan that has the right to foreclose must use the judicial foreclosure procedures of the state where the property securing the loan is located. The borrower has the right to assert in the proceeding the nonexistence of a default and any other claim or defense to acceleration and foreclosure, including any claim or defense based on any violations of this chapter, though no claim or defense is considered a compulsory counterclaim.

(l) A creditor may not engage in a practice or have a policy that encourages the making of a high cost home loan on the basis of race, ethnicity, gender, or age.

Sec. 16. (a) If a creditor asserts that grounds for acceleration exist and requires the payment in full of all sums secured by the security instrument, the borrower, or anyone authorized to act on the borrower's behalf, may, at any time before the title is transferred by means of foreclosure, by judicial proceeding and sale, or otherwise, cure the default and reinstate the home loan by tendering the amount or performance as specified in the security instrument. If the borrower cures the default, the borrower must be reinstated to the same position as if the default had not occurred, and any acceleration of any obligation under the security instrument or note arising from the default is nullified as of the date of the cure.

(b) Before an action is filed to foreclose upon the home or other action is taken to seize or transfer ownership of the home, a notice of the right to cure the default must be delivered to the borrower, informing the borrower of the following:

(1) The nature of default claimed on the home loan and of the borrower's right to cure the default by paying the sum of money required to cure the default. However, a creditor or

servicer may not refuse to accept any partial payment made or tendered in response to the notice. If the amount necessary to cure the default will change during the thirty (30) day period after the effective date of the notice due to the application of a daily interest rate or the addition of late fees as allowed by this chapter, the notice must give sufficient information to enable the borrower to calculate the amount at any point during the thirty (30) day period.

(2) The date by which the borrower must cure the default to avoid acceleration and initiation of foreclosure, or other action to seize the home. The date may not be less than thirty (30) days after the date the notice is effective. The name, address, and telephone number of a person to whom the payment or tender must be made must also be disclosed.

(3) That if the borrower does not cure the default by the date specified, the creditor may take steps to terminate the borrower's ownership in the property by requiring payment in full of the home loan and commencing a foreclosure proceeding or other action to seize the home.

(4) The name and address of the creditor and the telephone number of a representative of the creditor whom the borrower may contact if the borrower disagrees with:

(A) the creditor's assertion that a default has occurred; or

(B) the correctness of the creditor's calculation of the amount required to cure the default.

(c) To cure a default under this section, a borrower may not be required to pay a charge, fee, or penalty attributable to the exercise of the right to cure a default, as provided for in this section, other than the fees specifically allowed by this section. The borrower is not liable for:

(1) attorney's fees relating to the borrower's default that are incurred by the lender before or during the thirty (30) day period described in subsection (b)(2); or

(2) a fee exceeding one hundred dollars ($100) that is incurred by the lender after the expiration of the thirty (30) day period but before the lender files a foreclosure action or takes other action to seize or transfer ownership of the home.

After the lender files a foreclosure action or takes other action to seize or transfer ownership of the home, the borrower is liable only for attorney's fees that are reasonable and actually incurred by the lender, based on a reasonable hourly rate and a reasonable number of hours.

(d) If a default is cured before the initiation of an action to foreclose or to seize the residence, the creditor may not institute the foreclosure proceeding or other action for that default. If a default is cured after the initiation of any action to foreclose, the creditor shall take the steps necessary to terminate the foreclosure proceeding or other action. A creditor making a home loan who has the legal right to foreclose must use the judicial foreclosure procedures of the state where the property securing the loan is located. The borrower may assert in a judicial foreclosure proceeding or other action the nonexistence of a default and any other claim or defense to acceleration and foreclosure, including a claim or defense based on violations of this chapter. However, a claim or defense may not be considered a compulsory counterclaim.

Sec. 17. (a) Notwithstanding any other law, if a home loan was made, arranged, or assigned by a person selling either a manufactured home or home improvements to the dwelling of a borrower, the borrower may assert all affirmative claims and any defenses that the borrower may have against the seller or home improvement contractor against the lender, an assignee, a holder, or a servicer, in any capacity.

(b) Notwithstanding any other law, the remedies provided in this chapter apply to:

(1) the creditor;

(2) a director, an officer, an employee, or a controlling stockholder of, or agent for, a creditor who personally participated in the making or approving of a high cost home loan; and

(3) any other person to whom this chapter applies and who violates the requirements of this chapter.

A person who purchases or is otherwise assigned a high cost home loan is subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the original creditor or broker of the loan.

(c) Notwithstanding any other law, a borrower who is in default for more than sixty (60) days or who is in foreclosure may assert a violation of this chapter by way of offset:

(1) as an original action;

(2) as a defense or counterclaim to an action to collect amounts owed; or

(3) to obtain possession of the home secured by the home loan.

(d) It is a violation of this chapter for a person to attempt to

avoid the application of this chapter by:

(1) dividing a loan transaction into separate parts; or

(2) engaging in other subterfuge.

Sec. 18. (a) A person who knowingly or intentionally violates this article commits a:

(1) Class A misdemeanor; and

(2) deceptive act that is actionable by the attorney general under IC 24-5-0.5 and is subject to the penalties listed in IC 24-5-0.5.

(b) A person who violates this chapter is liable to the borrower for the following:

(1) Actual damages, including consequential and incidental damages. The borrower is not required to demonstrate reliance in order to receive actual damages.

(2) Statutory damages equal to the finance charges agreed to in the home loan agreement, plus ten percent (10%) of the amount financed.

(3) Punitive damages, if the violation was malicious or reckless.

(4) Costs and reasonable attorney's fees.

(c) A borrower may be granted injunctive, declaratory, and other equitable relief as the court determines appropriate in an action to enforce compliance with this chapter.

(d) The knowing or intentional violation of this chapter or a rule adopted under the authority of this chapter renders the home loan agreement void, and the creditor has no right to collect, receive, or retain any principal, interest, or other charges with respect to the loan. The borrower may recover any payments made under the agreement.

(e) The remedies provided in this section are cumulative but are not intended to be the exclusive remedies available to a consumer. A consumer is not required to exhaust any administrative remedies under this chapter or under any other applicable law.

(f) A creditor in a home loan who in good faith fails to comply with this chapter may not be considered to have violated this chapter if the creditor establishes:

(1) that not later than thirty (30) days after the date of the loan closing, and before receiving any notice from the borrower of the compliance failure, the creditor has made appropriate restitution to the borrower and appropriate adjustments are made to the loan; or

(2) that:

(A) not later than sixty (60) days after the date of the loan closing and before receiving any notice from the borrower of the compliance failure, the borrower is notified of the compliance failure, appropriate restitution is made to the borrower, and appropriate adjustments are made to the loan; and

(B) the compliance failure was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adopted to avoid the errors.

Bona fide errors include clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations under this section is not a bona fide error.

Sec. 19. The rights conferred by this chapter are in addition to rights granted under any other law.

Sec. 20. The department may adopt rules under IC 4-22-2 to implement this chapter.